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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 543

W. C. WALLACE, D/B/A Wallace Novelty Company, Petitioner.

Vs.

THE CITY OF CARTERSVILLE, SAM McGOWAN, As The Mayor Of The City Of Cartersville, J. V. BISHOP, WARREN AKIN, SAM SMITH And H. H. GREENE, As The Board Of Aldermen Of The City Of Cartersville, And E. J. AUCHMUTEY, As Chief Of Police Of The City Of Cartersville,

Respondents.

BRIEF FOR RESPONDENTS OPPOSING WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Respondents adopt as substantially true the statements of petitioner, W. C. Wallace, by and through his counsel, praying that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above stated case on the 15th day of October, 1947, affirming a judgment of the

Superior Court of Bartow County Georgia, as contained in his petition down to

"Reasons relied on for allowance of the writ—" on page 5 of his petition.

REASONS RELIED ON BY RESPONDENTS FOR DENIAL OF WRIT AND BRIEF IN SUPPORT OF MOTION TO DENY.

Under the Charter powers granted to the City of Cartersville, Georgia, Laws of 1937, pages 1532-95, of which this court will take judicial cognizance, the State of Georgia delegated to respondent the powers contained therein, and we quote therefrom:

> "Section 1. The inhabitants of the territory now embraced in the corporate limits of the City of Cartersville, in Bartow County, Georgia, shall continue to be, and are hereby incorporated under the name and style of the 'City of Cartersville' —and vested with all rights, powers and privileges incident to muncipal corporations in this state or cities thereof,—may by its corporate name sue and be sued, contract and be contracted with, plead and be impleaded, have and use a common seal; make and enact through its Board of Aldermen such ordinances, by-laws, rules, regulations and resolutions for the transaction of its business, and the welfare and proper government of said city, as to said Board of Aldermen, may seem best, and which may be consistent with the laws of the State of Georgia and the laws of the United States."
>
> "Section 4. The municipal government of said city shall vest in a governing board to be

known as 'The Board of Aldermen of the City of Cartersville' and shall consist of a Mayor, from the City at large and four Aldermen, one from each of the four wards,—

"The Board of Aldermen of the City of Cartersville shall have all powers of government in and of said City of Cartersville, except as may be expressly provided herein."

The general welfare powers of the said city are found in Section 60 of said Charter, to-wit:

"Section 60. The Board of Aldermen of the said City of Cartersville, shall have power and authority to pass all laws and ordinances that they may consider necessary for the peace and good order, health, prosperity, comfort, and security of said City and the inhabitants thereof, and that may be necessary to foster virtue and good morals in said city, to suppress lewdness, gambling, disorderly conduct and to enforce such laws and ordinances by such penalties as are authorized by this charter. The said Board of Aldermen shall have full power to adopt and enforce any and all ordinances they may consider advisable or necessary to carry out this charter, to make and enforce such ordinances, rules and regulations for the government of their body and all the offices of said city, and do any and all other acts and exercise all other powers conferred upon them by this charter, and that may be done or exercised under the laws of this state, conferring powers upon municipal corporation—".

Section 78 of the charter of said city empowers the Board of Aldermen to declare by ordinance what shall be a nuisance in said city, to-wit:

"Said Board of Aldermen may by ordinances

declare what shall be a nuisance in said city and provide for the abatement of same."

The City of Cartersville is within a proper exercise of the police power delegated to it by the State of Georgia in its charter.

The validity of such an act or ordinance as affected by the due process cause of the Federal Constitution was decided in **Murphy** vs. **California** 225 U. S. 623, 41 L. R. A. (N. S.) 153. The opinion in that case was written by Mr. Justice Joseph Rucker Lamar. The City of South Pasadena, California, in pursuance of police power conferred under the Constitution of that state, passed an ordinance prohibiting any person from keeping or maintaining a billiard or pool room establishment for hire and public use. The constitutional provision applicable is as follows:

> "Any County, City, Town, or Township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws;" Article 11, Section II, Constitution of California.

In the opinion of the Supreme Court it was said:

> "The 14th Amendment protects the citizen in his right to engage in any lawful business but it does not prevent legislation intended to regulate useful occupations which, because of their nature, or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations which may or may not be harmful to

the public, according to local conditions or the manner in which they are conducted. Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on Plaintiff's application for Habeas Corpus, a nuisance per se. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant. That the keeping of the billiard hall has a harmful tendency is a fact requiring no proof and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the items and other evils which result from the maintenance of resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game, but at the place; and where in the exercise of the police power the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go beyond their finding and inquire in the local condition or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the order. As said in **Booth** vs. **Illinois** 184 U. S. 425,429; 'A calling may not in intself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious if,—the state thinks that certain

admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot enter in, unless, looking through mere form and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of the rights secured by the fundamental law,—".

The decision which the petitioner seeks to review by Writ of Certiorari, decided October 15, 1947, cites many authorities of the State of Georgia and of the Supreme Court of the United States, showing that the courts of Georgia and the Federal Court as well have upheld the constitutionality of such ordinances in so far as they pertain to alleged violations of property rights, and in that decision the courts properly brush aside allegations in the petition to the effect that certain city officials in their individual capacity had in conversation lead the petitioners to believe that "Pin-ball" Machines would be licensed by the City of Cartersville as of no binding force upon the City of Cartersville and could not nullify a regularly enacted ordinance upon the subject matter. In his original petition the petitioner never charged any acts confiscating his machines except mere conclusion that to refuse him license would in effect destroy his property rights in said machine.

The Supreme Court of Georgia, therefore, was auth-

orized and required to uphold respondent, The City of Cartersville, in its right to enact the ordinance in question. We respectfully request that the Supreme Court of the United States refuse to grant the Writ of Certiorari to the Supreme Court of Georgia.

Respectfully submitted,

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